No. 83-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,

Petitioners,

v.

ITT WORLD COMMUNICATIONS INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT ITT WORLD COMMUNICATIONS INC.

GRANT S. LEWIS
Counsel of Record for Respondent ITT World Communications Inc.
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

JOHN S. KINZEY
MARY JO EYSTER
CHARLES C. PLATT
LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE
SUSAN I. LITTMAN
ITT WORLD COMMUNICATIONS INC.
100 Plaza Drive
Secaucus, New Jersey 07096
(201) 330-5000

February 24, 1984

QUESTIONS PRESENTED

1. Did the lower court err when it held that the Government in the Sunshine Act, 5 U.S.C. § 552b, applies to closed meetings of the Federal Communications Commission ("FCC") with representatives of foreign telecommunications administrations at which, the FCC's representatives have admitted, the FCC is "applying leverage," in "a negotiating stance" and seeking a "*quid pro quo*"?

2. Did the lower court err when it held that the FCC's *ultra vires* attempts to negotiate with the foreign administrations on behalf of respondent's competitors constituted final agency "action" that was subject to judicial review in the district court, rather than a final agency "order" that was subject to review in the first instance in the court of appeals?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Cases PAGE

B. Decisions of the Federal Communications Commission

PAGE

D. Legislative Material

E. Other Materials

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-371

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,

Petitioners,

v.

ITT WORLD COMMUNICATIONS INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT ITT WORLD COMMUNICATIONS INC.

Respondent ITT World Communications Inc. ("ITT Worldcom") submits this brief in opposition to the brief submitted on behalf of petitioners Federal Communications Commission ("FCC") and the United States of America.[1]

STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the FCC's brief, this case involves the application of Sections 10(b) and 10(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 703 and 704, which are set forth in a statutory appendix.

1 ITT Worldcom's statement pursuant to Rule 28.1 of the Supreme Court Rules is included in its brief in opposition to the FCC's petition for a writ of certiorari. Since that statement was prepared, one of ITT Worldcom's affiliates has acquired twenty five percent of the common stock of Thomson McKinnon Securities Inc., which is publicly traded.

STATEMENT OF THE CASE

A. The Nature of the Controversy

This controversy arose because the FCC, the agency responsible for licensing the international telecommunications facilities that link the United States with other nations, sought to use the leverage it enjoyed by virtue of this regulatory power to influence the policies of other governments' telecommunications administrations. Because negotiation with foreign governments is, as the FCC recognized, the exclusive province of the State Department, the FCC's efforts to bargain with the foreign administrations could not stand the light of day. The FCC therefore insisted that ITT Worldcom and other interested American parties, which had been allowed to attend the FCC's previous, lawful discussions with the foreign administrations, be excluded from these meetings, which were then moved behind closed doors. By holding its improper discussions with the foreign administrations, and attempting to conceal from interested parties and the courts what had actually transpired during the closed meetings, the FCC ran afoul of numerous provisions of the Communications Act, the Logan Act, the Government in the Sunshine Act, and the Freedom of Information Act.

The writ of certiorari brings before this Court only two of the many issues on which the court of appeals ruled below. The FCC urges that the lower court erred when it (1) held that the FCC must comply with the provisions of the Sunshine Act when it meets with the foreign administrations, and (2) ruled that the district court, rather than the court of appeals, has jurisdiction to review in the first instance whether the FCC's representatives engaged in *ultra vires* misconduct during the closed meetings that have already taken place.

It should be emphasized at the outset that the arguments the FCC advances in this Court are all premised on the unsubstantiated factual assertion that its closed discussions with the foreign administrations were nothing more than "an informal exchange of views on extremely general subjects." FCC Brief at 26. There is not a shred of admissible evidence in the record that supports the FCC's persistent efforts to characterize its

meetings with the foreign administrations as "informal" information exchanges. To the contrary, the court of appeals specifically concluded that the closed meetings were *not* " 'informal discussions' among members," but rather were "prearranged conferences held to effectuate public business of the greatest import." 43a, 699 F.2d at 1244.[2]

The lower court based these conclusions on the FCC's own admissions that when it met with the foreign administrations, it was applying "leverage," "in a negotiating stance," and expecting a "tit" for its recent authorization of the "TAT," the new transatlantic cable sought by the Europeans and originally opposed by the FCC. Even though these admissions refute the FCC's claim that it did nothing more than exchange information "informally" at the closed meetings, the FCC made no effort to rebut them with affidavits or other evidence when it responded to ITT Worldcom's motion for summary judgment on its Sunshine Act claim. Instead, the FCC affirmatively represented to the district court that "there are no material issues of fact in dispute in this case." (JA 173.) For the FCC to suggest that this case involves the question of whether the Sunshine Act applies to "informal, general discussions . . . concerning issues of mutual interest," FCC Brief at (i), is an improper attempt to argue in this Court a case that was never presented to the courts below.

B. Underlying Facts

ITT Worldcom is one of a number of American carriers that compete to provide international telecommunications services between the United States and foreign countries.[3] Although

---

2 Citations herein of a page number followed by a small "a" are to the appendices to the FCC's petition. Citations in the form "JA" followed by a page reference are to the Joint Appendix.

3 When this controversy arose, the principal American carriers that competed to provide international "record," or non-voice, communications services were ITT Worldcom, RCA Global Communications, Inc., Western Union International, Inc., and TRT Telecommunications Corp. These carriers are generally known as international record carriers, or "IRCs." American Telephone & Telegraph Co. was, and remains, the dominant carrier of international "voice" communications.

ITT Worldcom has ownership interests in cable and satellite systems that link the United States and the rest of the world, it cannot provide service directly to any foreign nation without the cooperation of that nation's telecommunications "administration," which owns and operates the local telecommunications network in the foreign country. The foreign administrations are generally governmental agencies that enjoy a monopoly of telecommunication services within their respective nations. ITT Worldcom has entered into arrangements known as "operating agreements" with a number of foreign administrations that allow ITT Worldcom to offer its American subscribers international communications with those administrations' customers.

Although the FCC has authority under Title II of the Communications Act, 47 U.S.C. § 201 *et seq.*, to regulate the rates and practices of ITT Worldcom and the other American carriers that provide international services, it has no jurisdiction over other governments' telecommunications administrations. The FCC does, however, have the ability to influence the foreign administrations indirectly, because Section 214 of the Communications Act, 47 U.S.C. § 214, gives the FCC power to approve or disapprove the American carriers' applications for the construction of new international facilities, which are ordinarily constructed jointly by the American carriers and the foreign administrations. Pursuant to Section 5(d)(1) of the Communications Act, 47 U.S.C. § 155(d)(1), the FCC has formally delegated its authority to rule on "Section 214" applications for new international facilities to a committee of three FCC commissioners designated as its "Telecommunications Committee." 47 C.F.R. § 0.215.

The FCC's ability to deny the necessary authorizations for international facilities that the European administrations want to build has recently caused considerable friction between the FCC and those foreign administrations. In particular, the FCC has been reluctant to approve the construction of new transatlantic submarine cables (known by the acronym "TATs") that the European administrations thought were needed. *See, e.g., American Tel. & Tel. Co. (TAT-7)*, 73 F.C.C.2d 248 (1979); *North Atlantic Facilities Plan*, 71 F.C.C.2d 64 (1979); *Policies to be Followed in Future Licensing of Facilities for*

Overseas Communications, 67 F.C.C.2d 358 (1977), *on further consideration*, 71 F.C.C.2d 71 (1979), *on reconsideration*, 71 F.C.C.2d 1090 (1979).[4] At a meeting held in September 1974, the FCC and the European administrations "determined that an ongoing process of exchange of information and views among all the entities concerned with the provision of telecommunications services in the North Atlantic Region could improve the planning of jointly-owned facilities in that region," and, it was hoped, "avoid divergent facilities preferences among [European administrations], Canada, and the U.S." *Policies for Overseas Common Carrier Facilities*, 73 F.C.C.2d 193, 195 (1979). *See also Inquiry into Policy to be Followed in Future Licensing of Facilities for Overseas Communications*, 53 F.C.C.2d 121, 122-3 (1975). Thereafter, a series of meetings began that came to be known as the "Consultative Process." These meetings were open to all interested parties, including ITT Worldcom, as well as the FCC and the foreign administrations. The FCC was represented at the meetings by members of its staff, and by the three members of its Telecommunications Committee who, as indicated above, had been authorized to rule on applications for new international facilities.

Beginning with its decision in *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1970), *aff'd sub nom. Washington U.&T. Comm'n v FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), the FCC has evolved a policy of "open entry" into the domestic telecommunications market, which allowed new competitors to compete with the older, more established domestic carriers. In 1977, the FCC, apparently without any prior consultation with the foreign administrations, authorized two of the new domestic carriers, GTE Telenet Communications Corp. ("GTE") and Graphnet Systems, Inc. ("Graphnet") to provide international service in competition with ITT Worldcom and the other existing IRCs. In a departure from its traditional regulatory practice, the FCC granted GTE and Graphnet this authorization even though neither carrier had negotiated the "operating agreements" with

---

4 The FCC has suggested that increases in transatlantic traffic might better be accommodated by additional satellite channels, rather than the new cables that the Europeans prefer.

foreign administrations that were necessary before they could actually begin to provide international service. On appeal, the Court of Appeals for the Second Circuit reversed the FCC on this ground, holding that the FCC erred "in granting [GTE and Graphnet] perpetual authorization regardless of how long the consummation of necessary agreements with foreign communications administrations may take." *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 903 (2d Cir. 1979). The Second Circuit instructed the FCC to place a reasonable limit on the amount of time GTE and Graphnet had to negotiate satisfactory operating agreements, after which their authorizations would automatically expire.[5]

GTE and Graphnet were not immediately successful in obtaining operating agreements with the foreign administrations which, as governmental monopolies, do not share the FCC's policy preference for unrestricted "open entry" into the telecommunications market. The court of appeals found that "[i]n response, the Commission in 1979 turned to the consultative process as a forum for encouraging foreign cooperation with the newly authorized carriers," 5a, 699 F.2d at 1225, and attempted to use the Consultative Process "as the vehicle to assist Graphnet and [GTE] . . . in obtaining interconnection agreements." 39a, 699 F.2d at 1242. To accomplish this objective, the FCC insisted on excluding the American carriers from its meetings with the foreign administrations:

> At the October, 1979 [Consultative Process] meeting in Dublin, Ireland . . . the [FCC's] Telecommunications Committee persuaded its foreign counterparts to expand the meeting's focus to "include the United States' authori-

---

5 The Second Circuit also found merit in ITT Worldcom's principal appellate argument that the FCC had given GTE and Graphnet an unfair competitive advantage over ITT Worldcom and the other established IRCs by allowing them to provide international service without subjecting them to the significant restrictions on their domestic operations to which the IRCs were then subject. The court suggested that the FCC expedite a pending proceeding in which it was considering the IRCs' requests to expand their domestic operations, and directed it to modify the authorizations it had granted GTE and Graphnet to remove any inequalities in competitive opportunities that remained after the pending FCC proceeding had been concluded.

> zation of new telecommunications services and carriers," and to exclude representatives of American carriers from this part of the meeting. In addition to the Dublin meeting, a February 1980 meeting in Ascot, England and an October, 1980 meeting in Madrid, Spain were closed during discussions of this topic.

5a-6a, 699 F.2d at 1225 (footnote omitted).

Because the FCC consented to the adjudication of ITT Worldcom's district court action on summary judgment before any meaningful discovery was had, *see infra*, p. 14, ITT Worldcom does not know to this day precisely what transpired at the closed meetings between the FCC and the foreign administrations. Without any evidentiary support, the FCC's attorneys have argued in their briefs that the closed meetings were nothing more than "informal information exchanges," no different from the exchanges that occurred at the open Consultative Process meetings. However, the FCC has never explained, in the lower courts or in this Court, why, if this were so, the FCC found it necessary to insist that the meetings be closed, rather than follow the traditional open meeting format.

As will be more fully demonstrated below, statements made publicly by the FCC's commissioners and staff, when uncensored by counsel, enabled ITT Worldcom to demonstrate to the satisfaction of the lower courts that the FCC was in fact engaged in activities far more significant than "informally exchanging information" during its closed meetings. More specifically, these statements established that the FCC was negotiating with the foreign administrations by "advising the foreign administrations of a linkage between their cooperation with the newly authorized American carriers and the Commission's receptivity to their needs in other areas," such as the authorization of new overseas facilities. 7a, 699 F.2d at 1226.

For example, Charles Ferris, who was then chairman of the FCC, testified at a Congressional hearing that the Telecommunications Committee "seeks to apply 'leverage' at the [closed] meetings to 'bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment . . . [we] have in the United States.' " 7a-8a, 699 F.2d at 1226, n.26. Similarly,

Commissioner Fogarty stated during a speech in Montreal that because the FCC had accommodated the European administrations by authorizing a new transatlantic communications cable, or "TAT," "the FCC expects a 'tit' for the 'TAT' and a '*quid pro quo*.' " *Id.* At a later FCC meeting, Commissioner Fogarty stressed the importance of showing the European administrations that "we . . . really mean business." (JA 152.) A third commissioner, Commissioner Washburn, conceded in an open FCC meeting that the Telecommunications Committee was "talking to people in a negotiating stance abroad." 7a-8a, 699 F.2d at 1226, n.26. And the FCC's general counsel described the closed meetings as a "mechanism to narrow differences and to move toward consensus on common principles and approaches." (JA 167-68.)

After reviewing statements such as these, the court of appeals concluded:

> The CP discussions are not "chance meetings," "social gatherings," or "informal discussions" among members, but prearranged conferences held to effectuate public business of the greatest import. They focus on concrete issues and are conducted to build a "consensus" that will have far-reaching effects on the structure of the communications industry. They are, in short, an integral part of the Commission's policymaking processes, and as such they constitute the "conduct . . . of official agency business."

43a, 699 F.2d at 1244 (footnote omitted).

C. Proceedings Before the FCC and the District Court

The FCC's decision to use its leverage to "encourage" the foreign administrations to enter into operating agreements with GTE and Graphnet was a cause of considerable concern to ITT Worldcom. As indicated above, the foreign administrations do not share the FCC's policy preference for a multiplicity of international carriers. Any decision by a foreign administration to deal with the two new carriers the FCC favored was therefore likely to make that administration less likely to continue its existing operating agreements with ITT Worldcom, or to give ITT Worldcom new operating agreements in the

future. Further, as a result of their past difficulties in obtaining FCC approval for new international facilities, the foreign administrations were likely to be extremely susceptible to the FCC's suggestions that its receptivity to their future facility requests would depend on their treatment of GTE and Graphnet.

In an effort to learn more about what the FCC had been doing at the closed meetings, and to prevent the FCC from continuing its improper efforts to influence the foreign administrations, ITT Worldcom took a number of steps, first before the FCC and then before the district court. As will be described below, the FCC took no action in response to ITT Worldcom's requests for administrative relief (other than to proceed with its plans for another closed meeting with the foreign administrations in Ascot, England) until ITT Worldcom brought suit against it in the district court. The FCC then adopted formal decisions denying ITT Worldcom the administrative relief it sought that were carefully crafted in an effort to improve the FCC's litigation position in the district court.

1. *The Freedom of Information Act Request*

On October 12, 1979, after the FCC had held its first closed meeting with the foreign administrations in Dublin, ITT Worldcom made a request to the FCC for the disclosure of documents pertaining to that meeting, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. (JA 20.) On November 16, 1979, the Chief of the FCC's Common Carrier Bureau, acting pursuant to delegated authority, refused to produce fifteen of the twenty-three documents responsive to ITT Worldcom's request. (JA 22.) On December 17, 1979, ITT Worldcom filed an Application for Review of this decision with the full FCC. Although the FOIA required the FCC to rule on ITT Worldcom's request within twenty days, 5 U.S.C. § 552 (a)(6)(ii), the FCC had taken no action when ITT Worldcom commenced its district court action on February 12, 1980, which, *inter alia*, sought to compel disclosure of the documents the FCC had withheld. On February 14, 1980, two days after ITT Worldcom's complaint was served, the FCC voted to adopt a *Memorandum Opinion and Order* (JA 93), which

granted ITT Worldcom access to a few of the documents, but otherwise denied ITT Worldcom's administrative appeal.

In its *Memorandum Opinion and Order* disposing of the FOIA appeal, the FCC took the position that its participation in the closed meetings was an integral part of performing its official function:

> The Commission *must* attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest and to regulate "interstate and *foreign* commerce in communications so as to make available . . . to all the people of the United States a rapid, efficient . . . worldwide wire and radio communications service with adequate facilities at reasonable charges. . . ."

(JA 97-98, citations omitted, initial emphasis supplied.)

The FCC upheld the nondisclosure of documents pertaining to the closed meeting in Dublin under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), as subject to the so-called "deliberative process" privilege. In so holding, the FCC expressly conceded that the discussions at the closed Dublin meeting were part of a process of deliberation that would ultimately result in a final agency determination:

> The Dublin conference and the various memoranda related thereto were likewise intended to assist the Commission in gathering information concerning international facilities matters which ultimately will be presented for its determination. The memoranda are therefore deliberative and predecisional materials.

(JA 99.)

2. *The Rulemaking Proceeding*

On October 29, 1979, ITT Worldcom filed a petition for administrative rulemaking with the FCC. (JA 32.) Because the FCC now argues that an appeal from the FCC's decision denying this petition was the only vehicle by which ITT Worldcom could obtain judicial review of the FCC's misconduct at its closed meetings with the foreign administrations, it is important to emphasize that ITT Worldcom's petition did

not seek any form of relief from the FCC's actions at its meeting in Dublin, the only closed meeting that had already occurred.[6] Nor did ITT Worldcom seek an adjudication from the FCC of the legality of the agency's own past conduct.

Although ITT Worldcom's petition for rulemaking preserved ITT Worldcom's position that efforts to influence foreign administrations would be *ultra vires*, the petition was premised on the assumption that the FCC would continue to meet with the foreign administrations. ITT Worldcom sought purely prospective procedural relief to prevent the FCC from intentionally or inadvertently abusing the Consultative Process in the future. As a result, ITT Worldcom's request for rulemaking was largely addressed to the FCC's discretion. ITT Worldcom requested, *inter alia*, that the FCC adopt regulations that would delineate the authority of the commissioners and staff who met with the foreign administrations, and clearly indicate that they had no power to negotiate or bind the FCC. ITT Worldcom also asked that the FCC adopt procedural rules for the meetings that would provide that the meetings ordinarily would be open, and that interested parties would receive notice of the meetings and an opportunity to comment on the subjects the FCC proposed to discuss with the foreign administrations.

The FCC took no action on ITT Worldcom's rulemaking petition until ITT Worldcom had brought suit in the district court. The FCC then denied the petition and, as the court of appeals observed, "there is evidence suggesting that the rulemaking denial was crafted in part to enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48.[7]

---

6 Indeed, the petition for rulemaking contains only a single passing reference to the Dublin meeting. (JA 44.)

7 The evidence to which the court of appeals referred consists of statements by the FCC's general counsel and staff at the meeting at which the FCC denied ITT Worldcom's rulemaking petition. General counsel Bruce, successfully arguing against Commissioner Washburn's suggestion that action on ITT Worldcom's petition be further delayed, advised the FCC that it should "deal with this petition at this time because of the pending litigation in the District Court," and an FCC staff member told the commissioners that

In addition to denying ITT Worldcom's petition for prospective relief, the FCC gratuitously volunteered a lengthy self-serving denial that it had acted improperly in the closed meetings it had already held with the foreign administrations. The FCC conceded, as it does in this Court, that it has no authority to "negotiate" with foreign administrations, but it denied that it had in fact done so. In thus judging itself innocent of any misconduct, the FCC made no effort to explain its members' prior statements that the FCC's representatives were "applying leverage," were seeking "tit for TAT" and were asking for a "*quid pro quo*" at the closed meetings. At the very meeting at which the FCC voted to adopt the rulemaking denial, which asserted that the FCC had never engaged in "negotiations," Commissioner Washburn made the remarkable statement that no transcripts should be prepared at the closed meetings because "[w]hen you are talking to people in a negotiating stance abroad you don't want to get in that posture. . . ." (JA 158.) Despite these inconsistent statements, which the FCC's rulemaking denial never even acknowledged, the FCC's decision characterized the closed meeting as nothing more than "informal exchanges." Aside from this conclusory, self-serving characterization, the rulemaking denial gave virtually no details as to what the FCC claims was actually said and done at any of the closed meetings.[8]

---

the draft order that had been circulated would be changed to "help it coordinate with the collateral court suit that ITT has filed in the District Court. . . ." 50a, 699 F.2d at 1248, n. 202. (JA 162.)

8 With respect to the specific procedures that ITT Worldcom recommended the FCC follow at its meetings with the foreign administrations, the FCC purported to find merit in most of ITT Worldcom's suggestions, including its proposal that the meetings ordinarily be open. However, it stated that it would follow these procedures as a matter of discretion, without adopting any binding rules, and the FCC "expressly reserve[d] the right to depart from [these procedures] where necessary. . . ." 11a, 699 F.2d at 1228. Despite the FCC's protestations that it would ordinarily follow these procedures, it simply ignored them when it next met with the foreign administrations. Further, its decision not to follow these procedures was itself made in secret, rather than at an open meeting conducted in accordance with the Sunshine Act.

3. *The District Court Action*

While its FOIA appeal and rulemaking petition were languishing without action before the FCC, ITT Worldcom learned that the FCC was planning another "closed door" meeting with the foreign administrations in England. The purpose of this meeting was disclosed by Commissioner Fogarty at an open FCC meeting on January 30, 1980, at which the FCC voted to extend the deadline that it had placed on Graphnet's efforts to negotiate operating agreements pursuant to the remand from the Second Circuit in *ITT World Communications, Inc. v. FCC, supra*. Commissioner Fogarty stated that "we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe." (JA 152.) Commissioner Fogarty, who had previously stated that he and the other members of the Telecommunications Committee were seeking a "tit for TAT" and a "*quid pro quo*" from the Europeans, went on to urge that the FCC extend Graphnet's Section 214 authorization, because if it did not, "it might be a signal to the European entities that we don't really mean business." *Id.*

On February 12, 1980, ITT Worldcom filed suit against the FCC in the United States District Court for the District of Columbia. As its first claim for relief, ITT Worldcom sought judicial review of what had actually transpired at the Telecommunications Committee's closed meetings with the foreign administrations, and a determination that the FCC had in fact engaged in *ultra vires* attempts to negotiate with those foreign governmental entities on behalf of ITT Worldcom's competitors. In contrast to the discretionary relief that ITT Worldcom sought from the FCC in its rulemaking petition, ITT Worldcom's complaint in the district court prayed for an injunction that would permanently enjoin the FCC from continuing its *ultra vires* misconduct. ITT Worldcom's complaint also sought an order requiring the FCC to comply with the Sunshine Act when it met with the foreign administrations, and asked the district court to direct the FCC to release the documents that it had refused to produce in response to ITT Worldcom's FOIA request.

The district court's disposition of ITT Worldcom's complaint came on cross-motions for summary judgment. Pursuant to a local court rule, ITT Worldcom submitted a statement of the facts it contended were not in dispute on its Sunshine Act claim. (JA 170.) As part of this statement, ITT Worldcom proffered what it asserted were true reports and transcripts of the concessions made by the FCC's commissioners and staff that the Telecommunications Committee was applying "leverage," seeking "tit for TAT," and "in a negotiating stance" when it met with the foreign administrations. (JA 171, incorporating JA 164-169.) In its response to ITT Worldcom's statement, the FCC agreed that the facts were not in dispute, and admitted that its representatives had made the statements that ITT Worldcom quoted. (JA 173.) The FCC submitted no affidavit or other evidence to describe what it claimed occurred at the closed meetings with the foreign administrations, and it made no effort to establish, as a factual matter, that only "informal" exchanges of information occurred at those meetings.

The FCC's decision not to raise any issue of fact in the district court as to what actually occurred at the closed meetings was undoubtedly a calculated litigation strategy designed to avoid pretrial discovery in which ITT Worldcom might develop more evidence of what actually occurred at the closed meetings.[9] Rather than risk discovery by disputing ITT Worldcom on the facts, the FCC chose to rely principally on a legal argument that the Sunshine Act could not apply to the closed meetings because the Telecommunications Committee, which represented the FCC at those meetings, was less than a quorum of the full FCC.

While the FCC did not submit any evidentiary opposition to ITT Worldcom's motion for summary judgment on its Sunshine Act claim, the FCC's legal memoranda nonetheless "engaged in much obfuscation about the substance of [its] discussions" at the closed meetings. 29a, 699 F.2d at 1237.

---

9 ITT Worldcom served interrogatories and document requests with its complaint. The FCC's responses to these discovery requests were patently inadequate, and ITT Worldcom's motion to compel pursuant to Fed. R. Civ. P., Rule 37, was pending at the time the district court entered judgment.

Much of the confusion in the FCC's papers resulted from the FCC's inability to give a consistent description of what occurred at the meetings without compromising its legal position on one or more of the claims that ITT Worldcom had made against it. For example, in opposition to ITT Worldcom's Sunshine Act claim, the FCC continued to argue, without evidentiary support, that the closed meetings were only "informal" information exchanges at which no deliberations or decisions occurred and no official business was conducted. However, in opposing ITT Worldcom's attempt to compel the disclosure of documents under the FOIA, the FCC continued to take the position that background memoranda prepared for the Telecommunications Committee's use before the closed meetings were "predecisional," and therefore exempted from disclosure by the "deliberative process" privilege of the FOIA.

Having before it ITT Worldcom's unrebutted evidence that the Telecommunications Committee was engaged in substantive discussions with the foreign administrations, and faced with the FCC's inability to give a coherent account of the closed meetings even in its unsworn papers, the district court held that the FCC had failed to meet its burden under the Sunshine Act to demonstrate that the Telecommunications Committee was not conducting official agency business on the FCC's behalf when it met with the foreign administrations. *See* 5 U.S.C. § 552b(h)(1).[10] The district court also directed the FCC to disclose the documents that ITT Worldcom sought under the FOIA. Finally, the district court dismissed ITT Worldcom's claim based on allegations of *ultra vires* conduct, on grounds of ripeness and standing that were rejected by the court of appeals and that the FCC does not raise in this Court.

D. The Court of Appeals' Decision

ITT Worldcom and the FCC appealed and cross-appealed from the district court's judgment, and these apeals were consolidated for argument with ITT Worldcom's petition for review of the FCC's order denying its petition for rulemaking.

---

10 This section of the Sunshine Act gives the district courts jurisdiction to enforce the Act and provides that in any such action "[t]he burden is on the defendant to sustain his action." *See infra*, p. 20.

The FCC sought a stay pending appeal from the district court's judgment requiring it to comply with Sunshine Act, first in the district court and then in the court of appeals. In support of these stay applications, the FCC submitted affidavits from its representatives at the closed meetings which, for the first time, asserted under oath that the FCC had limited itself to activities that might be characterized as "informal information exchanges" at the closed meetings. The FCC declined to permit ITT Worldcom's counsel to examine its affiants on the conclusory, self-serving statements set forth in their affidavits, and the motions for a stay were denied in both lower courts.[11]

In its decision on the merits, entered February 1, 1983, the court of appeals affirmed the district court's ruling on ITT Worldcom's Sunshine Act claim. The court noted that on appeal, the FCC "has relied heavily on the Lee and Demory affidavits [submitted in support of its stay applications] in support of its characterization of the closed CP meetings," even though "[n]either affidavit was submitted until after the district court had rendered its decision." 45a, 699 F.2d at 1245, n. 179. The court of appeals "look[ed] with great disfavor on such *post hoc* attempts to supplement the record," *id.*, but nonetheless considered the affidavits' contents. The court found that "the affidavits are vague, conclusory and contradictory," and "largely parrot[ ] the language of the statute and the legislative history." *Id.* The court of appeals concluded that "such conclusory affidavits, even if properly considered at this juncture, are wholly inadequate to sustain the Commission's burden of proof" under the Sunshine Act. *Id.* The court of appeals therefore agreed with the district court "that there are no genuine issues of material fact. . . ." 35a, 699 F.2d at 1240. It affirmed the lower court's determinations that the Telecommunications Committee was authorized to act on be-

---

11 The FCC refused to produce the first affiant, Commissioner Lee, for examination at the district court's hearing on the FCC's stay application in that court. When the FCC moved for a stay pending appeal four months later in the court of appeals, its motion was denied after the FCC declined ITT Worldcom's request to depose FCC staff member Demory, who had submitted a second affidavit in support of that motion.

half of the full FCC at the closed meetings, 36a-37a, 699 F.2d at 1240-41, and that the closed meetings were not "informal" exchanges of information but rather were "prearranged conferences held to effectuate public business of the greatest import" and "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.

In reversing the dismissal of ITT Worldcom's first claim for relief, based on its allegations that the FCC had engaged in *ultra vires* negotiations with the foreign administrations, the court of appeals found that the FCC's attempts to coerce the foreign administrations into giving GTE and Graphnet operating agreements would not, by their nature, result in a final FCC "order" which could be reviewed directly by the court of appeals. The court therefore held that the misconduct alleged in ITT Worldcom's complaint fell within the district court's residual jurisdiction to review final agency "action" that is not a final "order" appealable to the court of appeals. The court also rejected the FCC's argument that it should review the legality of the FCC's conduct at the meetings when it ruled on ITT Worldcom's appeal from the FCC's rulemaking denial. The court held that there was no factual or evidentiary "record" before it on the rulemaking appeal that would allow it to determine what had actually occurred at the closed meetings, and found that in the absence of such a record, *de novo* fact-finding by the district court was necessary for adequate judicial review. 13a-21a, 699 F.d at 1229-33.[12]

SUMMARY OF ARGUMENT

I. Because the FCC deliberately chose not to contest the facts in the courts below, this Court should reject the FCC's unsupported assertions that it was only "exchanging information informally" with the foreign administrations, rather than "applying leverage" and seeking a "*quid pro quo*," as it conceded in its response to ITT Worldcom's summary judg-

---

12 In other portions of its decision that are not before this Court, the court of appeals also reversed the denial of ITT Worldcom's rulemaking petition, and reversed in part and affirmed in part the district court's ruling sustaining ITT Worldcom's FOIA claims.

ment motion. The lower courts correctly held that the FCC failed to meet its burden to sustain its actions under the Sunshine Act, and the decision below should therefore be affirmed by this Court.

A. The court of appeals, largely on the basis of the FCC's own representations to the lower courts, correctly determined that the Telecommunications Committee was "authorized" to act on behalf of the full FCC. Contrary to the FCC's arguments, the Sunshine Act does not require that authorization be conveyed with any particular degree of formality, and the FCC may not justify its refusal to comply with the Sunshine Act by relying on its unlawful failure to specify the Telecommunications Committee's authority by published rule or order, as it was required to do by the Communications Act. In any event, the Telecommunications Committee's activities at the closed meetings fall within the Committee's "formal" authorization to license new international facilities, since the FCC itself insists that the Committee's participation in the meetings is a necessary part of discharging this delegated authority.

B. The court of appeals correctly determined that the closed meetings were "meetings" for the purposes of the Sunshine Act. The FCC does not deny that if it was "applying leverage," "in a negotiating stance" and "seeking tit for TAT," as it admitted below, the Sunshine Act would be fully applicable. Even if the closed meetings were merely "information exchanges," as the FCC claims, they would still be subject to the Act, under the legal standard the FCC proposes in its brief, because they are an integral part of the FCC's decisional processes that precede final agency action on requests for new international facilities.

C. The FCC's remaining arguments against the applicability of the Sunshine Act are essentially policy arguments against the wisdom of the Act's provisions that were rejected by Congress.

II. The court of appeals correctly decided that the district court, rather than the court of appeals, should adjudicate ITT Worldcom's allegations that the FCC in fact engaged in *ultra*

vires negotiations at its closed meetings with the foreign administrations. The FCC's activities at the closed meetings did not result in agency "orders" within the appellate jurisdiction of the court of appeals, but rather were within the district court's "residual" jurisdiction to review final agency "actions" that do not take the form of orders. The court of appeals' decision on this issue is consistent with the generally recognized principle that when the governing statutes permit, review of agency action requiring *de novo* fact-finding should be channeled to the district courts, rather than to the courts of appeal. The lower court's recognition of a limited "residual" jurisdiction in the district court will not disrupt the administrative process, because the familiar doctrines of ripeness, finality, and exhaustion of administrative remedies will prevent interlocutory interruption of ongoing administrative proceedings except in unusual cases, such as this, in which the agency engages in patently *ultra vires* misconduct that cannot be adequately remedied on direct appeal from a future final order.

POINT I: THE COURT OF APPEALS CORRECTLY HELD THAT THE FCC FAILED TO MEET ITS BURDEN TO SUSTAIN ITS ACTIONS UNDER THE SUNSHINE ACT.

It is axiomatic that this Court "cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967), *quoting Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The FCC nonetheless would have this Court ignore the proceedings before the two lower courts and determine *de novo*—on the basis of the FCC's self-serving statements in its brief rather than on the undisputed evidentiary record below—what in fact transpired at the FCC's closed meetings with the foreign administrations.

Over and over again, in each point of its Sunshine Act argument, the FCC's brief describes the closed meetings as nothing more than "informal" information exchanges, as if constant repetition of that adjective could make the FCC's assertions true. In suggesting that the court of appeals has

applied the Sunshine Act to "informal" information exchanges, the FCC raises a "straw man." The court of appeals expressly recognized that the Act "does not *per se* forbid all informal off-the-record discussions between a quorum of an agency and outside parties. . . ." 43a, 699 F.2d at 1244. However the court of appeals found that "there is substantial evidence that would appear to contradict the Commission's characterization of the discussions as mere unofficial 'information exchanges,' " 7a, 699 F.2d at 1225, and it specifically affirmed the district court's determination that the FCC's closed meetings were *not* " 'informal discussions' among members." 43a, 699 F.2d at 1244. Rather, the court of appeals concluded that the closed meetings were "prearranged conferences held to effectuate public business of the greatest import," which "focus[ed] on concrete issues" and which were "in short, an integral part of the Commission's policymaking processes. . . ." *Id.*

The issue before this Court therefore is whether the Sunshine Act applies to meetings that the FCC's representatives attend in their "official" capacities and "in a negotiating stance," at which they seek, by applying "leverage," to secure a "tit for TAT" or a "*quid pro quo*," and at which they "really mean business." These are the facts that the lower courts had before them—facts that the FCC made a calculated decision not to deny below, and facts that it studiously refrains from addressing in its brief to this Court.

Although the FCC ignores the issue in its brief to this Court, the Sunshine Act unambiguously places the burden of proof on the FCC to demonstrate that its closed meetings were not subject to the Act. The Act expressly provides that in any enforcement action brought in the district court, "[t]he burden is on the defendant to sustain his action." 5 U.S.C. § 552b(h)(1).[13] Even though it bore this burden, the FCC

---

13 As the legislative history demonstrates, the Act places the burden of proof on the agency for the logical reason that only the agency is in a position to know what transpired in meetings from which the public is excluded:

> The burden of proof is on the agency to sustain its conduct. This is in accord with the presumption of openness established in the bill. *Those*

elected not to submit any evidence in the district court to contradict ITT Worldcom's evidence of what occurred at the closed meetings, and, in response to ITT Worldcom's summary judgment motion, it declined to offer "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P., Rule 56(e). Instead, in what was unquestionably a litigation tactic aimed at avoiding discovery, the FCC agreed that there were no disputes as to material facts and consented to the adjudication of ITT Worldcom's Sunshine Act claim on summary judgment. The factual record before the district court therefore consisted solely of the unrebutted statements on which ITT Worldcom relied that demonstrated the FCC was *not* merely exchanging information "informally" at the closed meetings, but rather was there in a "negotiating stance," "applying leverage," and seeking a "tit for TAT" and a "*quid pro quo*."

Further, the lower court decisions were based not only on the FCC's failure to submit any evidence of its own in answer to the admitted statements on which ITT Worldcom relied, but on the numerous contradictions and inconsistencies in the FCC's orders and its representations to the lower courts. Simply put, the FCC's dilemma in the lower courts was that it could not give a consistent account of what occurred at the closed meetings without fatally compromising its legal position on one or more of the challenges that ITT Worldcom raised to its actions. This dilemma is perhaps best illustrated by the court of appeals' treatment of the post-judgment affidavits that the FCC belatedly submitted in an effort to support its characterizations of the closed meetings. Even at that late stage of the proceedings, after its litigation strategy had failed in the district court, the FCC's carefully crafted affidavits were dismissed by the court of appeals as "vague, conclusory and contradictory," and insufficient to raise a genuine issue of fact.

---

who wish to operate in secrecy should have to justify it. Furthermore, in most cases the agency will be the only party in possession of information that might justify closing the meeting. The burden must therefore be on the agency to produce any facts that may support its action.

S. Rep. No. 94-354, 94th Cong., 1st Sess. 33 (1975) (emphasis supplied).

Now that the resolution of ITT Worldcom's Sunshine Act claim is the only issue before this Court on the merits, the FCC has abandoned its efforts to concoct a description of its actions that would somehow be consistent with all of the FCC's legal positions on each of the many issues raised below. Instead, it asserts only those positions that advance its Sunshine Act arguments, ignoring the contradictory positions it took before the lower courts. For example, the FCC no longer feels the need to concede that the members of the Telecommunications Committee attend the closed meetings in their "official" capacities, as it did when it was forced to respond to ITT Worldcom's *ultra vires* claim. It no longer feels the need to concede that the FCC "must attend such conferences" to discharge its regulatory duties, as it did when it was attempting to demonstrate that documents pertaining to the closed meetings were subject to the "deliberative process" privilege of the FOIA. Instead, the FCC's brief in this Court constantly repeats the conclusory assertion that the closed meetings were only "informal," "unauthorized" exchanges of information, as if this repetition could excuse or hide the fact that the FCC made no effort in the lower courts to offer credible evidence that might support this characterization of the closed meetings, the characterization it now embraces in an effort to sustain its legal position in this Court.

In the end, there are few differences between the parties as to the legal principles that govern the application of the Sunshine Act. ITT Worldcom does challenge, however, the FCC's right to disavow facts in this Court that it conceded below. It is simply too late in the day for the FCC to reverse course and contest factually whether it engaged in "formal" or "informal," "authorized" or "unauthorized," activities at the closed meetings. The omissions, inadequacies and contradictions in the factual presentations made by the FCC in the lower courts, resulting as they did from a litigation strategy that the FCC deliberately adopted, are deficiencies of the FCC's own making, and aptly illustrate the truth of Scott's verse, "oh, what a tangled web we weave, when first we practice to deceive." This Court, like the two lower courts, should rule that the FCC has failed to meet its burden to sustain its actions under the Sunshine Act, and affirm.

A. The Telecommunications Committee Was Authorized To Act on Behalf of the Full FCC at the Closed Meetings with the Foreign Administrations.

The requirements of the Sunshine Act are applicable both to the agency itself, and to "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1). The legislative history of the Act demonstrates that a subdivision is subject to the Act even if it is not authorized to take final action on behalf of the full agency:

> A subdivision of an agency . . . is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b.

H. Rep. No. 94-880, 94th Cong., 2d Sess. 7 (1976) (hereinafter "*House Report*"). *Accord* S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975) (hereinafter "*Senate Report*").

The court of appeals based its conclusion that the three members of Telecommunications Committee had been authorized to act on behalf of the full FCC at the closed meetings on three subsidiary determinations: (1) the Telecommunications Committee attended the closed meetings "in their official roles," "in their official capacities," and "*qua* the Telecommunications Committee"; (2) the Committee pursued a goal endorsed by the full FCC of "build[ing] a 'consensus' that will lead ultimately to operating agreements for ITT's competitors"; and (3) upon return from the closed meetings, the Committee's members "convey the information and views 'exchanged' at the meetings to the full Commission for its consideration." 36a-37a, 699 F.2d at 1241; 53a, 699 F.2d at 1249. The FCC does not argue that the court of appeals lacked an adequate basis for these determinations, which are taken in large part from representations in the FCC's appellate brief.

Further, the court of appeals bolstered its conclusion that the Telecommunications Committee was "authorized" to act on behalf of the full FCC by pointing out that the FCC "insists in its rulemaking denial that the Committee's participation in the meetings is necessary for the [FCC] to carry out its statutory duty to regulate international communications," which duty, insofar as it concerns the construction of new international facilities, has been expressly and formally delegated to the Telecommunications Committee. 37a, 699 F.2d at 1241. The rulemaking denial unambiguously demonstrates that the Telecommunications Committee participated in the closed meetings with the authorization of the full FCC and at its direction:

> *[W]e have undertaken to have Commission representatives meet* face to face with them [the foreign administrations] to discuss mutual present and future telecommunications needs. . . . To the extent that these informal discussions can advance *our* progress toward realizations of statutory goals, they are a necessary and natural corollary of our international licensing authority.

81a-82a (emphasis supplied).

Other FCC statements on which ITT Worldcom relied below indicated that "the Commission must attend" the meetings with the foreign administrations to carry out its regulatory duties. (JA 97.) Certainly Commissioner Fogarty had no doubts about his authority to speak for the entire FCC when he addressed the European administrations at an open meeting in Montreal, which occurred just before the first closed meeting in Dublin:

> I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and Mr. Lee, and for the other commissioners who are not present—we want to meet you half way but we do request, I think, that the *quid pro quo* would be . . . .

(JA 165.)

Indeed, the FCC never asserted that the Telecommunications Committee was acting unofficially or without its authority

until it was required to respond to ITT Worldcom's summary judgment motion. Having elected not to contest ITT Worldcom on the facts of what actually occurred at the closed meetings, the FCC's only remaining defense to the application of the Sunshine Act was a legal argument that the Telecommunications Committee was not "authorized" to act on its behalf. However, faced with ITT Worldcom's claims that the Telecommunications Committee was engaged in *ultra vires* misconduct, the FCC was forced to take the position below that the members were acting in their "official capacities," 53a, 699 F.2d at 1249, yet without "authorization" from the full FCC. Given the contradictions inherent in the careful distinctions that the FCC sought to draw below, the court of appeals can hardly be criticized for finding that the Telecommunications Committee acted with the full FCC's knowledge, approval and authority.

Despite the lower court's determination that the Telecommunications Committee was indeed "authorized" to act on the full FCC's behalf at the closed meetings, which was based largely on the FCC's own statements to that effect, the FCC argues in this Court that a subdivision can *never* be authorized to act on behalf of the full agency for purposes of the Sunshine Act unless that authorization is conferred pursuant to a formal agency vote and a published rule or order. There is no support for the FCC's argument in the Sunshine Act itself; the statute requires only that the subdivision be in fact "authorized to act on behalf of the agency" and does not require that the authorization be conferred with any particular degree of formality.

Further, in a portion of its decision which the FCC has not challenged in this Court, the court of appeals held that because the FCC refused to acknowledge that the Telecommunications Committee was "authorized" to act on its behalf, the court was compelled to find that the FCC had violated the Communications Act when, in denying ITT Worldcom's rulemaking petition, it declined to delineate the Telecommunications Committee's responsibilities and powers at the closed meetings. The FCC is thus attempting in this Court to justify its failure to

comply with the Sunshine Act by relying on its adjudicated violation of the Communications Act. There is certainly nothing novel about the court of appeal's rejection of this argument and, as the lower court observed, "[t]he applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." 36a, 699 F.2d at 1240.

In any event, the argument which the FCC makes in this Court ignores the fact that the Telecommunications Committee has a formal, official delegation of authority from the full FCC that is sufficiently broad to apply to all of its actions at the closed meetings, no matter how those meetings are characterized. As described above, the FCC has adopted a published regulation (47 C.F.R. § 0.215) that delegates to the Telecommunications Committee the authority to license new international facilities, which is the basic subject both of the closed meetings and of the traditional Consultative Process meetings.[14]

The FCC's brief seeks to characterize the Telecommunications Committee's formally delegated power to rule on construction applications under Section 214 of the Communications Act as completely unrelated to anything which occurs at the closed meetings. According to the FCC, "[i]t has never been suggested that the attending commissioners performed [this] function[] at the Consultative Process." FCC Brief at 18.

---

14 The court of appeals stated that it would have found this regulation sufficient to "authorize" the Telecommunications Committee's participation in the closed meetings, if the FCC had so contended:

> If the Commission argued that the CP exchanges were important to the Committee's discharge of its delegated responsibilities, we might well conclude that no [further] explicit authorization to participate was necessary.

52a, 699 F.2d at 1249. However, because the FCC "adamantly maintained" that the Committee was *not* authorized so to act (to preserve its position on the Sunshine Act), *id.*, the Court of Appeals took the FCC at its word and directed the FCC, on remand in the rulemaking proceeding, to specifically delineate the Committee's authority at the closed meetings.

This statement is simply not true. The undisputed facts below established that the Telecommunications Committee was prepared to barter approval of proposed new communications facilities, which it has delegated authority to grant, for operating agreements for GTE and Graphnet. This was the "tit for TAT" that Commissioner Fogarty sought, and the "leverage" Chairman Ferris told Congress the FCC was applying. Even if this were not the case, however, it would by no means follow that the Telecommunications Committee was acting beyond the scope of its formal delegation of authority when it met with the foreign administrations.

Taking the view of the facts most favorable to the FCC, the FCC concedes that during the closed meetings the Telecommunications Committee "exchanges information and views," albeit "informally," concerning the foreign administrations' future needs for international communications facilities. Indeed, the only explanation the FCC has ever offered for sending the Telecommunications Committee to Europe at the taxpayers' expense is that the information the Committee learns there will assist it in discharging its delegated authority to rule on requests for new facilities. Because the Telecommunications Committee's "information exchanges" are directly related to matters that it has been officially delegated authority to regulate (and, indeed, according to the FCC, those exchanges are absolutely necessary to permit the Committee to discharge this delegated function, *see* JA 97), there can be no real question that the Telecommunications Committee is acting within the scope of its formally delegated authority when it "exchanges information" with the foreign administrations.

The FCC's argument on the authorization point seems to be based on its assertion that the Telecommunications Committee does not formally vote or finally decide any Section 214 applications during the closed meetings. However, this argument confuses the question of whether the Telecommunications Committee is *authorized* to participate in the closed meetings, regardless of what occurs there, with the question of whether the Committee's predecisional "information exchanges" are sufficiently focused and formal to constitute the

joint conduct or disposition of official agency business, a separate issue which is discussed below. *See infra*, pp. 28-33.

In the final analysis, the FCC's claim that the Telecommunications Committee is not authorized to act on behalf of the full FCC is simply incredible. The closed meetings grew out of the Consultative Process, a series of meetings that have been formally endorsed by the FCC and conducted under its aegis for nearly a decade. The three members of the Telecommunications Committee who represent the Commission there were not selected randomly or on an *ad hoc* basis; rather, they are the FCC's chairman and the two other commissioners who, by virtue of their delegated authority, have the greatest direct interest in the subject matters discussed there.[15]

Given the controversy that has arisen since the Telecommunications Committee first closed its meetings with the foreign administrations and the extensive attention that this controversy has received from the full FCC as the result of ITT Worldcom's FOIA request, its petition for rulemaking and its lawsuit, it is impossible to believe that the Telecommunications Committee, which continued to meet with the foreign administrations after the controversy arose, has been doing anything during the closed meeting without the rest of the FCC's full knowledge and approval. As the court of appeals concluded, "[w]hatever the actual scope of the Committee's endeavors, there can therefore be no question that they are undertaken 'on behalf of' the Commission." 37a, 699 F.2d at 1241.

B. The Telecommunications Committee Was Engaged in Deliberations That Determined or Resulted in the Disposition of Official Agency Business at the Closed Meetings.

The FCC next argues that its closed meetings with the foreign administrations were not "meetings" for purposes of the Sunshine Act because, according to the FCC, the Telecommunications Committee was not involved in "deliberations"

---

15 Indeed, it is no doubt important that the members of the Telecommunications Committee attend the closed meetings personally because only they, with their delegated authority, can assure the foreign administrations that any "deal" they negotiate will be honored by the FCC.

that "result in the joint conduct or disposition of official agency business."[16]

At the outset, it must be emphasized that the FCC's argument in this Court depends entirely on its unsupported factual contention that it did nothing more than "exchange information" with the foreign administrations when it met behind closed doors. The FCC does not deny that if it was in fact "in a negotiating stance," applying "leverage," demanding "tit for TAT" and "seeking to move toward consensus," as its representatives admitted in the statements that the FCC chose not to refute in the courts below, the Sunshine Act would be fully applicable to its closed meetings. The FCC's admissions should be dispositive here, just as they were in the lower courts, because they demonstrate that the FCC was not merely engaged in the "conduct of official agency business" within the meaning of the Act, but was, in the words of the court of appeals, conducting "public business of the greatest import" when it met with the foreign administrations. 43a, 699 F.2d at 1244.

Further, even assuming that the FCC had done nothing more than "exchange information" at the closed meetings, the inquiry would by no means be complete. While ITT Worldcom (and the court of appeals) recognize that the Sunshine Act was not intended to apply to all "informal background discussions which clarify issues and expose varying views," *Senate Report* at 19, the overriding goal of the Act is to expose to public scrutiny "not just the formal decisionmaking or voting but *all*

---

16 The FCC's brief divides its discussion of this issue into two separate points, one of which addresses the issue of whether the Telecommunications Committee engaged in "deliberations" at the closed meetings, and another which addresses whether those deliberations resulted in the "joint conduct or disposition" of agency business. However, in both of these sections of its brief, the FCC urges the Court to accept the same legal standard drawn from Berg & Klitzman, *An Interpretative Guide to the Government in the Sunshine Act* (1978); *i.e.*, whether the challenged discussion "is sufficiently focused on discrete proposals or issues to cause participants to form reasonably firm views." *See* FCC Brief at 24-25 and 29. Because ITT Worldcom accepts this common standard and submits that the lower courts correctly applied it, both Points I. B. and I.C. of the FCC's brief are addressed together above.

discussions relating to the business of the agency." *House Report* at 8. "The whole decisionmaking process, not merely its results, must be exposed to public scrutiny." *Senate Report* at 18. The legislative history unambiguously demonstrates that the Act was intended to encompass any information-gathering process that is likely to have a meaningful impact on final agency action.[17]

Reference to the FCC's brief demonstrates that the difference between ITT Worldcom and the court of appeals, on one hand, and the FCC on the other, does *not* concern the way in which the Sunshine Act is to be interpreted as a matter of law. The FCC's brief concedes that the Sunshine Act, while not applicable to "freewheeling, wide-ranging and informal discussions," is on the other hand "not confined to gatherings at which final votes are taken." FCC Brief at 27, 37. The FCC thus recognizes that the Sunshine Act applies to proceedings with "some degree of formality," FCC Brief at 25, leading up to final agency action, and proposes the following standard for distinguishing between activities subject to the Act and "informal" discussions outside its application:

> The test is whether the discussion is "decision-oriented," that is, "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."

FCC Brief at 29. ITT Worldcom accepts this quotation from the FCC's brief as an accurate statement of the rule imposed

---

17 For example, the legislative history reveals that "[p]anels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the [Act] to open their meetings to the public." *Senate Report* at 17. The Act applies to "meetings outside the agency . . . if they discuss agency business . . . ," *Senate Report* at 18, and the Act's open-meeting requirement "does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business." *House Report* at 8.

by the Sunshine Act, and respectfully submits that the court of appeals correctly applied this rule to the facts before it.[18]

The court of appeals found that the FCC's closed meetings are "prearranged conferences" that "focus on concrete issues" (*i.e.*, GTE's and Graphnet's needs for operating agreements and the foreign administrations' requests for new international facilities). Further, the subjects discussed at the closed meetings are "pending or likely to arise" before the FCC, because, as the court of appeals found, "[r]eference to the Commission's FOIA materials . . . suggests that a number of pending docket proceedings have in fact been discussed at the CP meetings," 50a, 699 F.2d at 1247, and because the FCC will be required to approve proposed new international facilities discussed at the closed meetings, as well as any new operating agreements that Graphnet and GTE achieve as a result of the FCC's efforts on their behalf.

Finally, the closed meetings are "decision-oriented" and likely to cause the Telecommunications Committee to form "reasonably firm positions" concerning these matters that it must eventually decide pursuant to its delegated authority. As the FCC stated in its order denying ITT Worldcom's rulemaking petition, "[t]he Consultative Process, even where limited to

---

18 The test on which ITT Worldcom and the FCC agree is consistent with the Sunshine Act's legislative history, which demonstrates that the requirement that an agency engage in "deliberations" and the joint "conduct" of agency business is not meant to create a rigid or restrictive prerequisite to the application of the Act, but rather is intended to require only that the agency's actions be characterized by a minimal degree of formality before the Act is invoked:

> The words "deliberation" and "conduct" were carefully chosen to indicate some degree of formality is required before a gathering is considered a meeting for purposes of this section.

Senate Report at 18. The legislative history contrasts meetings involving deliberations and the conduct of business with "chance encounters," "purely social gatherings," "luncheons" and the like. *Id. Accord House Report* at 3. As will be demonstrated below, the carefully planned international meetings of governmental agencies at issue here bear little resemblance to the unstructured, spontaneous discussions that Congress excluded from the Act's coverage.

a facilities planning format, provides a valuable if not indispensable source of information . . . because it facilitates our predictive judgment as to future communications needs and the solutions to those needs that will be acceptable to other countries. . . ." (79a.) Indeed, as discussed above, the only legitimate reason that the FCC has ever offered for the Telecommunications Committee's participation in meetings with the foreign administrations is that the Committee will use the information and views developed in the meetings to discharge its delegated responsibility to authorize new international communications facilities.[19]

The question of whether an agency is informally obtaining "background" information unrelated to any specific issue rather than gathering information as a predicate to decisionmaking cannot be answered by the FCC's mechanical invocation of the adjective "informal" to describe its activities, without the support of any subsidiary evidence. In the instant case, it is undisputed that the FCC's closed meetings with the foreign administrations are planned well in advance, have a fixed agenda, are addressed to a specific, narrow subject matter (new international facilities and services), are attended by FCC representatives who have delegated authority to act on behalf of the FCC with respect to those matters, and are intended by the FCC to acquire information that the FCC will use as a basis for its final decisions.[20] Assuming *arguendo* that

---

19 The important role that the Consultative Process actually plays in the planning and licensing of new facilities was recognized by the FCC in its decision authorizing the TAT-7 cable. *American Tel. & Tel. Co., supra*, 73 F.C.C.2d at 253-255.

20 The FCC's brief criticizes the court of appeals for allegedly rejecting a definition of the word "deliberation" limited to "weighing and examining proposals that precedes a formal decision by the agency." FCC Brief at 24. Because the FCC's own statements demonstrate that its meetings with the foreign administrations are an integral part of the FCC's policymaking procedures leading up to a formal agency decision on new international facilities, the test which the FCC urges is clearly satisfied. However, it should be noted that the court of appeals correctly held that the Sunshine Act cannot be construed in a way that restricts its applicability to agency action

the FCC did nothing more than "exchange information" at the closed meetings—and at the risk of becoming tiresome, we must reiterate that the evidentiary record is wholly to the contrary—there is no reason for this Court to disturb the court of appeals' conclusion that an "information exchange" with these characteristics is "an integral part of the Commission's policymaking processes." 43a, 699 F.2d at 1244.[21]

C. The FCC's Miscellaneous Arguments Against the Application of the Sunshine Act Are Without Merit.

The FCC argues as Point I.D. of its brief that the closed meetings between the FCC's representatives and the foreign administrations are not meetings "of" the agency, because they are held outside the agency's headquarters, sometimes in Europe, and because they are attended by representatives of the foreign administrations as well as by the Telecommunications Committee. The legislative history of the Sunshine Act demonstrates that the questions of where a meeting is held, and who is present in addition to the agency, are irrelevant if the meeting otherwise falls within the scope of the Sunshine Act:

> *[T]he mere setting of the gathering is not determinative* whether a gathering is a meeting for purposes of this subsection . . . Conference telephone calls and meetings

---

that results in formal written decisions, and excludes all other instances of the "conduct or disposition of official agency business." As the legislative history cited by the court of appeals establishes, " 'official agency business' encompasses far more than simply 'agency actions' of the sort reviewable under the APA." 38a, 699 F.2d at 1241 (footnote omitted).

21 The *Interpretative Guide*, on which the FCC principally relies, takes the position that "[a] discussion which significantly furthers the decisional process by narrowing issues, discarding alternatives, etc., should be treated as a meeting even though it does not and is not expected to achieve a complete resolution." *Id.* at 10, n.17. The FCC's general counsel has described the purpose of the FCC's meetings with the foreign administrations in remarkably similar terms: "A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differences, and to move toward consensus." (JA 167-68.)

> outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the requirements of this subsection. *The test is what the discussion involves, not where or how it is conducted.*

Senate Report at 18-19 (emphasis supplied).

> The conduct of agency business is intended to include not just the formal decisionmaking or voting, but *all* discussion relating to the business of the agency. *The limitation of the definition to "joint" conduct . . . does not exclude the situation where a subdivision authorized to act on behalf of the agency meets with other individuals concerning the conduct or disposition of agency business.*

House Report at 8 (emphasis partially supplied).

The FCC seems to recognize the clear import of this legislative history, FCC Brief at 37, n. 17, but nonetheless argues that the Sunshine Act should not be applied because the FCC, according to its brief, did not "control" the closed meetings, and therefore allegedly is unable to assure compliance with the Act. The extent of the FCC's "control" over the closed meetings is an issue of fact that the FCC did not attempt to raise below. It is obvious, however, that the FCC seriously understates its ability to "control" the terms and conditions on which its meetings with the foreign administrations are held given the following undisputed facts: (1) the FCC was able to expand the Consultative Process, when it chose to do so, to include the subject of operating agreements for the new carriers, a subject the foreign administrations had shown no interest in discussing, 5a-6a, 699 F.2d at 1225; (2) the FCC's unilateral insistence was sufficient to exclude ITT Worldcom and other interested American parties from the closed meetings; (3) after the district court's decision, the FCC was able to require the foreign administrations to maintain a transcript of the Madrid meeting, to comply with the lower court's order; and (4) after its motion for a stay pending appeal was denied, the FCC hosted a Consultative Process meeting in New Orleans, which was conducted openly in compliance with the Sunshine Act, and which was described in the trade press as

"totally harmonious in tone, and one of the most successful of the series of consultative process sessions which have been held in the past several years." *Telecommunications Reports*, Vol. 47, No. 8, p. 20 (February 20, 1981).[22]

Because the FCC must approve new international facilities that the foreign administrations desire, it is the FCC that has "leverage" over the foreign administrations, and not the other way around. There is no reason to assume that the FCC could not convince the foreign administrations to continue the traditional "open meeting" format of the Consultative Process, just as it convinced them to close the meetings when that suited its purposes.

Assuming, however, that the FCC is indeed unable to convince the foreign participants to continue to participate in open meetings, it has no choice but to refrain from authorizing its representatives to conduct official business there. There is nothing in the Act or its legislative history that suggests that an agency may dispense with the procedural safeguards the Act demands simply because a third party with whom the agency wishes to conduct business refuses to comply with the Act's requirements. Congress made a judgment that when an agency is "talking to people in a negotiating stance abroad" or seeking a "*quid pro quo*," it must do so in the sunlight (unless one of the exceptions to the Act applies).[23]

The FCC further argues that "strong considerations of policy and practicality" argue against applying the Sunshine Act to its meetings with the foreign administrations because to do so "will severely impede agency consultations with their foreign counterparts. . . ." FCC Brief at 36, 37. The short

---

22 As ITT Worldcom discussed in its brief in opposition to the petition herein, the relatively infrequent scheduling of Consultative Process meetings since the New Orleans gathering is most likely explained by budgetary restraints and Congressional criticism of the FCC's participation in the Consultative Process. *See* ITT Worldcom Brief in Opposition at 13-15.

23 It should be noted that the lower court's holding will have no impact on the conduct of the nation's foreign policy because the State Department, which is not a collegial agency, is not subject to the Sunshine Act.

answer to this argument is that Congress decided what this nation's policy should be when it enacted the Sunshine Act, and if, as the court of appeals found, the FCC's meetings fall within the Act's application, it is not for this Court to second-guess this Congressional policy determination. *Miller v. Youakim*, 440 U.S. 125, 142 n. 21 (1979); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1963). However, the FCC seriously overstates the effect that the decision below will have on its ability to communicate information and views with the foreign administrations, for a number of reasons.

First, the FCC's argument, like so much of the rest of its brief, is premised on the erroneous assumption that the court of appeals' decision applies to "informal" information exchanges. In actual fact, there is nothing in the lower court's holding to prevent the FCC's commissioners, singly or jointly, from attending international symposia, conferences, trade association meetings or other functions not narrowly focused on particular pending matters, at which information and views can be discussed. Second, even with respect to those meetings to which the Sunshine Act applies, the Act does not absolutely require open meetings, but rather recognizes a number of exceptions that permit an agency to close a meeting in appropriate circumstances, including a situation in which "the premature disclosure of [information] . . . would . . . be likely to significantly frustrate implementation of a proposed agency action." 5 U.S.C. § 552b(c)(9)(B).[24] Finally, as the FCC itself points out, the Sunshine Act only applies to collegial action by the agency itself, and the Act places no restrictions *whatsoever* on what an individual commissioner, or the FCC's staff, may do or say during any meeting with the foreign administrations,

---

24 If the FCC were permitted by law to engage in negotiations with foreign governmental agencies, it could presumably have invoked this exception to justify closing its meetings with the foreign administrations, on the grounds that premature disclosure of the parties' negotiating positions would frustrate the negotiations. It could not do so here, however, without effectively admitting ITT Worldcom's allegations that it was engaged in *ultra vires* misconduct.

so there will always be an avenues for full, frank, and uninhibited communications between representatives of the two sides.

ITT Worldcom recognizes that the facts presented to the court of appeals were somewhat unusual, but that is merely a reflection of how far afield the FCC went in its efforts to advance the private interests of GTE and Graphnet. At bottom, all that the court of appeals has held is that the Sunshine Act applies to a case in which the FCC has never adequately explained or disclosed what it was doing at its closed meetings, and in which the available, uncontroverted evidence strongly suggests that the FCC has engaged in *ultra vires* misconduct behind closed doors. It was precisely to bring questionable government activities of this sort into the sunlight that the remedial provisions of the Sunshine Act were enacted, and the court of appeals' decision should be affirmed by this Court.

POINT II: THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT HAD JURISDICTION TO ADJUDICATE ITT WORLDCOM'S CLAIMS THAT THE FCC HAD ENGAGED IN *ULTRA VIRES* MISCONDUCT WHEN IT MET WITH THE FOREIGN ADMINISTRATIONS.

The FCC argues that the court of appeals erred when it held that the district court, rather than the appellate court, had jurisdiction to adjudicate in the first instance ITT Worldcom's allegations that the FCC had engaged in *ultra vires* conduct at its meetings with the foreign administrations. The lower court's holding is, however, a proper application of the well established rule of administrative law that the district courts retain a limited "residual" jurisdiction to review administrative actions that are patently beyond the agency's jurisdiction or power, and that cannot be adequately remedied through statutorily prescribed review procedures.

The FCC first argues that Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), gives the court of appeals jurisdiction to review on direct appeal the legality of the FCC's actions at the closed meetings. ITT Worldcom and the court of

appeals' decision both recognize that the review procedures specified in Section 402(a) are ordinarily exclusive in those situations in which they are applicable. However, the FCC's argument disregards the key fact that Section 402(a) only authorizes direct appeals of final *orders* of the FCC. *See Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 415-16 (1942). Here, however, as the court of appeals pointed out, "the *ultra vires* count requires scrutiny of conduct outside the formal administrative process." 15a, 699 F.2d at 1230. Such conduct did not, and by its nature would not, result in anything which could be described as a final agency "order."

What the Telecommunications Committee in fact accomplished at the closed meetings held in Dublin, Ascot and Madrid does, however, constitute final agency "action," made reviewable by Section 10(c) of the APA, 5 U.S.C. § 704. The proper forum for judicial review of the FCC's activities is therefore the district court, which has "residual" jurisdiction to review all forms of final agency "action" which cannot be brought directly before the court of appeals as a final "order." *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979).[25]

Although the FCC apparently concedes that actions taken at the closed meetings are not in themselves "orders" that can be reviewed directly by the court of appeals, it argues that the court of appeals should nonetheless have determined whether the FCC had in fact engaged in *ultra vires* conduct when it ruled on ITT Worldcom's appeal from the denial of its rulemaking petition, because ITT Worldcom raised, or could have raised, this issue in the rulemaking proceeding. As the court of appeals observed, this argument "blurs an important distinction between the rulemaking petition and the *ultra vires* count." 14a, 699 F.2d at 1229.

---

25 The district court has "federal question" jurisdiction to review final agency actions. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). *See also, e.g., McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16 (1963); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1157 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 620 (D.C. Cir. 1979); *Ass'n of Bituminous Contractors v. Andrus*, 581 F.2d 853, 857 (D.C. Cir. 1978).

In the rulemaking proceeding, ITT Worldcom did not seek an adjudication as to the legality of the FCC's past conduct, and the rulemaking proceeding did not provide a mechanism by which it could do so. Under the APA, a "rule" is defined as "an agency statement of general or particular applicability *and future effect* . . . ," 5 U.S.C. § 551(4) (emphasis supplied), so the rulemaking proceeding was necessarily prospective in nature. To convince the FCC to adopt the rules it sought, ITT Worldcom was not required to prove that the FCC had done anything wrong in the past, but rather needed only to convince the FCC that its proposed rules were a sensible way of ordering the agency's future conduct. This issue could properly have been raised even if the FCC had never previously met with the foreign administrations, much less negotiated with them.

Further, to the extent that ITT Worldcom raised an issue related to its district court suit in the rulemaking proceeding, it prevailed on that issue before the FCC. The FCC specifically stated in its rulemaking denial that it had no power to negotiate with foreign administrations, which is as clear a statement of the FCC's prospective authority as ITT Worldcom could hope to achieve. ITT Worldcom did not challenge this portion of the FCC's rulemaking denial on appeal and, indeed, it was not a person "aggrieved" which could appeal this aspect of the FCC's decision. *See* 5 U.S.C. § 702.[26]

As the court of appeals correctly recognized, the "gravamen of the *ultra vires* count [in the district court] was very different" from ITT Worldcom's rulemaking petition, because ITT Worldcom sought to prove that notwithstanding the FCC's recognition that it lacked the power to negotiate with

---

26 The fact that ITT Worldcom complained on appeal about other portions of the FCC's rulemaking denial does not convert the rulemaking appeal into a vehicle to review the question of whether the FCC had power to "negotiate," a point on which ITT Worldcom and the FCC were in agreement. Surely the FCC would not argue that if it had chosen to grant the rulemaking petition *in full*, leaving ITT Worldcom nothing from which to appeal, it could effectively preclude judicial review of what had actually happened at the closed meetings it had already held.

the foreign administrations, the FCC "has *in fact* secretly exceeded its authority and will not admit to having done so." 14a, 699 F.2d at 1229. The question of what the FCC had in fact done at its closed meetings, and whether that conduct exceeded its statutory authority, is separate and distinct from the question of whether the FCC acted arbitrarily and capriciously in declining to adopt procedural rules to govern its future conduct, which was the issue before the lower court on appeal from the rulemaking denial. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, ___ U.S. ___, 103 S.Ct. 2856, 2866 (1983).

The FCC could not magically transform final agency "action" that occurred outside the formal agency process into a final agency "order" within the court of appeals' jurisdiction through the simple expedient of adopting the rulemaking denial after the lawsuit in the district court had already begun. Nor could it do so by gratuitously stating in the rulemaking denial that it had engaged in no improper conduct—a statement that was undoubtedly included in the rulemaking denial for the sole purpose of supporting the FCC's argument that its actions should be reviewed in the court of appeals, where there would be no record of its misconduct, rather than in the district court, where ITT Worldcom would be able to develop such a record through pretrial discovery.[27]

Furthermore, even if the FCC's actions at the closed meetings could somehow be characterized as "orders" that the court of appeals could review, Section 10(b) of the APA expressly authorizes resort to the residual jurisdiction of the district court when the statutorily prescribed review procedure is *inadequate*. 5 U.S.C. § 703. Here, the court of appeals properly held that the record on the rulemaking appeal was

---

27 In this Court, the FCC seeks to characterize ITT Worldcom's action in the district court as a "collateral attack" on the FCC's rulemaking denial. In actual fact, the rulemaking denial was a "collateral attack" on ITT Worldcom's complaint, since the only thing that convinced the FCC to act on ITT Worldcom's petition for rulemaking was its desire to "enhance the Commission's litigation posture in the district court action." 50a, 699 F.2d at 1247-48. *See supra*, p. 11.

"patently inadequate" to permit the court of appeals to determine the legality of the FCC's actions:

> We are asked, in essence, to approve of actions about which we know almost nothing. The record consists simply of the Commission's assertions that it has not negotiated, and of numerous statements by agency members that would appear to undercut these assertions. Self-serving representations are no substitute for an adequate record that would enable us to determine with confidence the actual scope of the Commission's endeavors.

48a-49a, 699 F.2d at 1247. It would have been literally impossible for ITT Worldcom to prove allegations of *ultra vires* misconduct, without any "pretrial" discovery, in the notice-and-comment rulemaking proceeding before the FCC. The court of appeals therefore held that "the jurisdiction of the district courts is properly invoked" because "*de novo* judicial factfinding is necessary for a fair examination of the disputed issues." 14a, 699 F.2d at 1229 (footnote omitted).[28]

The FCC's brief criticizes the court of appeals' reliance on the need for *de novo* fact-finding and the creation of an evidentiary record as determining factors in deciding that the FCC's activities at the closed meetings are agency "actions"

---

28 Not only was the record created by the rulemaking proceeding "patently inadequate" to permit ITT Worldcom to prove its claims that the FCC was engaged in *ultra vires* conduct, the rulemaking proceeding was inadequate to give ITT Worldcom the full measure of relief that it could obtain in the district court. Assuming *arguendo* that the FCC had adopted the procedural rules that ITT Worldcom sought, the FCC would remain free to modify them or make exceptions to them in particular circumstances. By contrast, if ITT Worldcom proved in the district court that the FCC had engaged in *ultra vires* conduct, it could obtain an injunction against the repetition of that conduct that the FCC could not unilaterally modify, and that could be enforced by contempt. Further, once it was determined precisely what the FCC had done in the closed meetings that had already occurred, the district court would have the power to order the FCC to take appropriate remedial action such as, for example, advising the foreign administrations that it expressly disavowed specific threats made at the meetings.

reviewable in the district court, rather than agency "orders" directly appealable to the court of appeals. However, the court of appeals is not alone in its assessment of the importance of these factors. As Professor Davis has observed:

> One basic belief of most federal judges is that district courts should have jurisdiction to review when review involves the taking of evidence, and that courts of appeals should normally have jurisdiction to review in other cases . . . .

4 Davis, *Administrative Law Treatise*, § 23.3 at 131 (2d ed. 1983).[29]

As Professor Davis goes on to observe, "the tension between that basic idea and some of the statutory provisions [which on their face require a different distribution of jurisdiction to review agency actions] has produced some complex law. . . ." *Id.* As illustrated by this Court's decision in *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), when Congress unambiguously confers on the courts of appeal jurisdiction to hear direct appeals of final agency "actions," and thus makes those courts' appellate jurisdiction coextensive with the administrative review provisions of the APA, the courts have no choice but to hold that the courts of appeal must entertain such appeals, regardless of how meager the administrative record may be. However, as Justice Rehnquist pointed out in his dissent in that case, "absent any clear indication to the contrary, the [review] statute should not be construed as creating a broad expansion of the jurisdiction of the federal courts of appeal," particularly when an expansive reading "is thor-

---

29 *See, e.g., Amusement & Music Operators Ass'ns v. Copyright Royalty Tribunal*, 636 F.2d 531, 533-34 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 912 (1982); *Inv. Co. Inst. v. Bd. of Governors*, 551 F.2d 1270, 1278 (D.C. Cir. 1977); *Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973); *Ind. Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 143 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971). *See also* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 57 (1975).

oughly inconsistent with the traditional role of appellate courts." 446 U.S. at 600.

Unlike the statutory scheme that was before the Court in *Harrison*, the Communications Act distinguishes between final "orders" that are appealable to the courts of appeal, and final agency "actions" that are not directly appealable to those courts. The Act therefore achieves the optimal division of the reviewing function suggested by Professor Davis, by giving the court of appeals power to review formal FCC "orders" resulting from the traditional administrative process and based on a record adequate for judicial review, while leaving residual jurisdiction in the district court to examine irregular agency "actions" outside the administrative process that cannot be evaluated without *de novo* fact-finding.

The FCC's brief raises the spectre that recognizing any residual jurisdiction in the district courts "offers regulated parties yet another tool for disrupting the administrative process by bringing time-consuming collateral attacks on agency decisions." FCC Brief at 48. This argument ignores the fact that the district court's exercise of its residual jurisdiction is severely circumscribed by the interrelated doctrines of exhaustion of administrative remedies, finality, and ripeness. *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 620 (D.C. Cir. 1979). In the absence of exceptional circumstances, these doctrines preclude interlocutory judicial interference with on-going administrative proceedings, and, of course when those proceedings culminate in a final agency "order," review will be available only in the court of appeals.[30] The District of Columbia Circuit has recognized that as the result of the application of these doctrines, a plaintiff will not be able to obtain relief in the district court "without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed

---

30 As to finality and ripeness generally, *see Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). As to exhaustion of administrative remedies, *see McKart v. United States*, 395 U.S. 185 (1969).

method of review." *Nader v. Volpe*, 466 F.2d 261, 266 (D.C. Cir. 1972) (footnotes omitted). *Accord Gulf Oil Corp. v. DOE*, 663 F.2d 246 (D.C. Cir. 1981).

Even though the FCC is well aware of the doctrines of ripeness, finality and exhaustion of remedies, and, indeed, argued unsuccessfully below that those doctrines barred ITT Worldcom's district court action,[31] its brief to this Court simply ignores the broad protection these doctrines provide from potentially disruptive "collateral" or "interlocutory" challenges to routine agency actions that take place within the normal administrative process. Instead, the FCC urges here what is in effect an absolute rule that the district court has no jurisdiction whatsoever over its actions, regardless of how egregious the circumstances may be. The FCC does not argue that the alleged absence of district court jurisdiction in this case turns on the happenstance that ITT Worldcom voluntarily attempted, in its rulemaking petition, to obtain some measure of relief from the FCC before bringing suit. The FCC asserts that even if ITT Worldcom had not done so, the district court would nonetheless have had no choice but to dismiss its complaint, and *require* ITT Worldcom to proceed before the agency, by rulemaking petition or request for declaratory ruling, until ITT Worldcom obtained a "final order" reviewable only in the court of appeals. FCC Brief at 44, n.24.[32]

---

31 The court of appeals rejected the FCC's argument that the Telecommunications Committee's actions at the closed meetings were not final or ripe for judicial review. 20a, 699 F.2d at 1232. Although the FCC argued in the district court that ITT Worldcom had failed to exhaust its administrative remedies, it did not press this argument on appeal, and the court of appeals found it unnecessary to address it. 21a, 699 F.2d at 1233, n. 73.

32 Interestingly, the FCC argues that such a dismissal by the district court should be based on the "primary jurisdiction" doctrine. That doctrine however, is intended to apply when issues within an agency's regulatory jurisdiction arise in a suit *to which the agency is not a party*. The doctrine is intended, *inter alia*, to avoid the possibility that the court, in adjudicating the suit without the benefit of the agency's views, will reach a result that conflicts with the regulatory goal the agency is pursuing. *See, e.g., Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *United States v. Western Pacific R. Co.*, 352 U.S. 59, 65 (1958). The doctrine has no

Acceptance of the FCC's argument that a party aggrieved of *ultra vires* agency actions must in all cases obtain a "final order" from the agency, judging itself innocent of the alleged misconduct, before that party can seek judicial relief would significantly rewrite established administrative law. It would overturn the well recognized exceptions to the exhaustion, finality, and ripeness doctrines that, as the lower courts recognized, allow a party in ITT Worldcom's predicament to go immediately to the district court. *See McKart v. United States*, 395 U.S. 185, 193 (1969) (exhaustion doctrine is "subject to numerous exceptions").[33] It would overrule prior decisions of this Court, which establish that even in an administrative proceeding that will ultimately result in a final order reviewable in the court of appeals, the district court may in appropriate circumstances intervene to enjoin administrative actions patently in excess of the agency's jurisdiction or power. *Leedom v. Kyne*, 358 U.S. 185 (1958); *McCulloch v. Sociedad Nacionale*, 372 U.S. 10 (1963).[34] And it would ignore this

---

applicability when the agency itself is *the defendant* in the lawsuit, in which case the appropriate question is whether the finality, ripeness, or exhaustion doctrines preclude the suit. The FCC's reliance on a primary jurisdiction argument in this Court would seem to be a calculated effort to avoid the question of whether these three doctrines apply, an argument it lost in the lower courts.

33 For example, when allegations of patently *ultra vires* administrative conduct are made, exhaustion of administrative remedies is generally not required. *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, *supra*, 617 F.2d at 621; *Nader v. Volpe*, *supra*, 466 F.2d at 267. Further, the exhaustion doctrine does not apply unless a party has an *adequate* administrative remedy. *See Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1954). ITT Worldcom did not have an adequate remedy at the FCC, because the FCC continued to schedule more closed meetings with the foreign administrations even after ITT Worldcom's rulemaking petition and FOIA request were submitted to the agency. In such a case, the finality and ripeness doctrines will not bar relief if the issues are fit for immediate judicial resolution and withholding court consideration would work a hardship on the parties. *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 148-49. *See* 20a, 699 F.2d at 1232.

34 As the court of appeals recognized, the principles of the *Leedom* case are *a fortiori* applicable here, because the court was not asked to

Court's admonition that Congress's statutory specification of review procedures for certain kinds of agency actions, such as FCC "orders," should not be construed to prevent review in the district court of other forms of final action not covered by the statute. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

While the residual jurisdiction of the district courts is, as ITT Worldcom recognizes, narrow and sparingly applied, that jurisdiction is absolutely essential to remedy *ultra vires* agency conduct outside the normal administrative process that cannot be adequately corrected on appeal from a subsequent "final order." In reaching its result in this case, the court of appeals was careful to point out that its decision was not intended to sanction review in the district court of an action that "is interlocutory in nature and can be corrected on court-of-appeals scrutiny of a subsequent, final action." 16a, 699 F.2d at 1230 (footnote omitted). The court of appeals held, however, that effective future review was not possible here because the FCC's activities at the closed meetings "are not calculated to result in a final order, but rather to lead to unreviewable actions by foreign administrations." *Id.*

In short, the court of appeals permitted district court review of the FCC's actions in this case only because (1) the actions themselves do not constitute a "final order" reviewable in the court of appeals, and (2) the court of appeals will not have an opportunity to determine the legality of the FCC's conduct on appeal from any future final order. The court of appeals' recognition of this limited residual jurisdiction in the district court will not, as the FCC argues, disrupt the functioning of the administrative process but, to the contrary, is necessary to effectuate this Court's holdings that adequate judicial review is presumptively available to all aggrieved parties. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

---

intervene in an agency proceeding that would eventually result in a final order reviewable in the court of appeals, but rather ITT Worldcom sought to enjoin misconduct that would never lead to a reviewable final order. 16a, 699 F.2d at 1230, n. 59. *See generally Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1067-68 (5th Cir. 1971).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GRANT S. LEWIS
Counsel of Record for Respondent
ITT World Communications Inc.
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

JOHN S. KINZEY
MARY JO EYSTER
CHARLES C. PLATT
LEBOEUF, LAMB, LEIBY & MACRAE

—and—

HOWARD A. WHITE
SUSAN I. LITTMAN
ITT WORLD COMMUNICATIONS INC.
100 Plaza Drive
Secaucus, New Jersey 07096
(201) 330-5000

February 24, 1984

STATUTORY APPENDIX

Section 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703, provides:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.